Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Robert R. Raymond, individually and doing business as Morningstar Consultants, and Robert G. Bernhoft, individually and doing business as Morningstar Consultants,

Petitioners,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

I. Whether Internal Revenue Code suit authorization requirements are procedural, as the Seventh Circuit opined, or rather jurisdictional, as all other federal courts have held on this singularly important question of subject matter jurisdiction.

II. Whether summary judgment may be granted in an equity suit for injunctive relief, where defendants ceased the complained of conduct well before suit was brought, and tendered unrebutted sworn declarations that they had reputations in their respective communities for truthfulness, and would not engage in the offending conduct in the future.

III. Whether a permanent injunction prohibiting defendants from engaging in mere political advocacy constitutes a prior restraint prohibited by First Amendment Free Speech and Press guarantees.

PARTIES TO THE PROCEEDING

The caption of this case contains the names of all parties to this proceeding, and neither of the Petitioners filing the instant Petition for Writ of Certiorari is a corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 228 F.3d 804 (7th Cir. 2000). A copy of the Opinion is included in the Appendix to this Petition for Writ of Certiorari, Appendix A at 1-23.[1]

The orders of the United States District Court for the Eastern District of Wisconsin adopting the U.S. Magistrate's Recommendation and entering judgment, and the Magistrate's Recommendation adopted by the district court, are all published at 78 F. Supp.2d 856 (E.D. Wis. 1999) and are included in Appendix B at 24-25, Appendix C at 26-28, and Appendix D at 29-91, respectively.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit both issued its Opinion and entered its affirming judgment on September 26, 2000. The instant Petitioners filed a timely Petition for Rehearing *En Banc* which the Seventh Circuit denied on December 6, 2000. (Appendix F at 99-100.) This Petition for Writ of Certiorari is timely filed within 90 days of the Seventh Circuit's denial of the Petition for Rehearing, and this Court's jurisdiction is properly invoked under 28 U.S.C. §§ 1254(1) and 2106.

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1 Citations to "Appendix" are to Petitioners' Separate Appendix filed separately but in conjunction with this Petition for Writ of Certiorari pursuant to Supreme Court Rule 14.1(i)(vi).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I
"Right to Free Speech and Press"

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

* * * * *

26 U.S.C. § 6700
Promoting Abusive Tax Shelters, etc.[2]

* * * * *

26 U.S.C. § 6701
Penalties for Aiding and Abetting Understatement of Tax Liabilities

* * * * *

26 U.S.C. 7402
Jurisdiction of District Courts

* * * * *

26 U.S.C. § 7408
Action to Enjoin Promoters of Abusive Tax Shelters, etc.

* * * * *

26 U.S.C. § 7701
Definitions

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[2] Due to their individual and aggregate length, the six Internal Revenue Code sections cited here are set out in full text in Petitioners' Separate Appendix at Appendices G-K, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

Internal Revenue Service ("IRS") Agent Jeffrey Palmer ("Palmer") began political surveillance of the U.S. Taxpayers Party and various party officials, including the National Vice-Chairman and Wisconsin State Chairman, as early as 1995. (R. at 322, Bernhoft's Third Decl., App. 60, ¶ 16; R. at 340, Raymond's Sixth Decl., App. 77, ¶ 8).[3] Palmer was compiling information on the Constitution Party platform, its conventions, and other activities. *See id.* The Constitution Party is nationally known for its outspoken criticism of the IRS. Petitioners Robert R. Raymond and Bernhoft G. Bernhoft are prominent, highly visible members of the Constitution Party.[4] (R. at 326, Raymond's Fourth Decl., App. 67, ¶ 14; R. at 322, Bernhoft's Third Decl., App. 60, ¶ 14.) Both men are state and national committeemen. *See id.* Raymond is also a two-time Constitution Party Senatorial candidate, while Bernhoft is the Constitution Party National Parliamentar-

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[3] Petitioners cite to the record below pursuant to Supreme Court Rule 12.7. Citations to the Petitioners' and the Government's various appendices filed with the United States Court of Appeals for the Seventh Circuit are:

(Br.App. x), Appellants' Required Appendix bound with their opening brief;

(App. x), Appellants' Separate Appendix filed in conjunction with their opening brief;

(SA x), the Government's Supplemental Appendix filed in support of its Appellee's Brief

(S.App. x), Appellants' Supplemental Appendix filed in support of their reply brief;

[4] The U.S. Taxpayers Party changed its name to the Constitution Party at its national convention in 1996. The Constitution Party is one of six parties recognized as national political parties by the Federal Election Commission.

ian and also serves on the Party's Executive Committee. *See id.*

During a six-month period between Fall 1995 and Spring 1996, Raymond and Bernhoft sold 32 copies of a collection of information known as the "De-Taxing America Program" to 32 members and supporters of the Constitution Party. *See id.* The looseleaf information was bound in (3) three-ring binders, and contained political polemic, theological exegesis, historical essays, state and federal case law, statutes, regulations, Internal Revenue Manuals, tax forms, and various form letters requesting information from government agencies. Revenue Agent Palmer became aware of this activity, and commenced a civil investigation as early as September of 1995. (R. at 327, Raymond's Fifth Decl., Exhibits A-L attached thereto.)

Palmer subsequently met with IRS Treasury Inspectors on December 19, 1995, and discussed an ongoing criminal investigation of Raymond and Bernhoft for their sale of the information binders. (R. at 327, Raymond's Fifth Decl., Ex. C attached thereto; R. at 291, Decl. of Treasury Inspector Jarosz.) On April 25, 1996, Treasury Inspector Jarosz approached the Criminal Section Chief in the United States Attorney's office, Francis D. Schmitz ("Schmitz"), and discussed the filing of IRS recommended criminal charges against Raymond, Bernhoft, and Morningstar Consultants for mail and wire fraud related to their sale of the controversial information binders. (R. at 327, Raymond's Fifth Decl., Ex. C attached thereto.) Schmitz declined to pursue criminal charges at this meeting based on his belief that there was no substantial harm to the Government, and that Raymond's and Bernhoft's known activity constituted First Amendment protected speech. *See id.*; R. at 289, Schmitz Decl., p. 2, ¶ 6.)

Sometime in Spring of 1996, Raymond and Bernhoft stopped selling the information binders, at a time when they were not aware that the IRS was investigating them both civilly and criminally. (R. at 322, Bernhoft's Third Decl, App. 60, ¶ 14; R. at 326, Raymond's Fourth Decl., App. 67, ¶ 6.) Later that same year, on November 15, 1996, Jarosz informed IRS Assistant District Counsel Langer ("Langer") and Revenue Agent Palmer that her criminal investigation of Morningstar Consultants, Raymond, and Bernhoft was closed. (R. at 291, Jarosz Decl., p. 3, ¶ 8.) On that same day, Palmer wrote Raymond and Bernhoft and advised them that his preliminary investigation of the "De-Taxing America Program" was complete. (R. at 259, Palmer's Third Decl., SA 155, ¶ 42.)

On May 12, 1997, Palmer swore out a declaration asserting he did not begin his investigation of Raymond and Bernhoft for selling the "De-Taxing America Program" until on or about June 24, 1996, over six months after Palmer's first meeting with Jarosz regarding a criminal investigation of Morningstar Consultants, Raymond, and Bernhoft, and over four months after his second meeting with Jarosz regarding that same criminal investigation. (R. at 21, Palmer's First Decl., SA 50, ¶ 5.) Palmer would also later testify that he never personally discussed a criminal investigation or the bringing of criminal charges against Morningstar Consultants, Raymond, or Bernhoft with any IRS employee. (R. at 327, Palmer Depo. of 10/17/97, Ex. K under Raymond's Fifth Decl.)

On February 25, 1997, Palmer issued "penalty assessments" of $32,000 each against Raymond and Bernhoft for allegedly engaging in conduct subject to penalty under 26 U.S.C. §§ 6700 and 6701. (R. at 21, Palmer's First Decl., SA 54, ¶ 20.) According to Palmer, these penalties issued because Raymond and Bernhoft sold thirty-two information binders for $34,578. *See id.* On November 13, 1996, IRS Assistant District Counsel Langer informed Treasury Inspector Jarosz that in lieu of

a criminal action against Raymond and Bernhoft, civil penalties and an injunction were being pursued through the Department of Justice. (R. At 327, Ex. C under Raymond Fifth's Decl.) Neither Palmer, Langer, nor any other IRS employee informed U.S. Department of Justice trial attorneys that AUSA Schmitz declined prosecution because of First Amendment concerns and his determination, upon reviewing the IRS's investigative information and recommendation for prosecution, that the Government had not been substantially harmed by Raymond's and Bernhoft's sale of information binders. (R. at 334, Tr. of Or. Arg., pp. 10-11.)

On March 3, 1997, the United States of America initiated an injunction action in the district court at the request of IRS attorney Langer, who directed the U.S. Attorney General bring a civil suit against Raymond and Bernhoft under 26 U.S.C. § 7408. (R. at 1, Pl.'s Compl., App. 7; R. at 20, Langer Decl., App. 19, ¶ 4.) The Government sought a Section 7408 injunction permanently restraining Raymond and Bernhoft from organizing or selling the "De-Taxing America Program", an allegedly abusive tax shelter within the meaning of 26 U.S.C. §§ 6700 and 6701, and from engaging in any conduct that substantially interferes with the enforcement of the internal revenue laws. (*See* R. at 1, Pl.'s Compl., App. at 7.)

The district court proceeded as if it had subject matter jurisdiction of a civil action arising under the laws of the United States pursuant to 28 U.S.C. §§ 1340 and 1345, and 26 U.S.C. §§ 7401, 7402(a), and 7408.[5] Of these, 26 U.S.C. § 7408 confers specific subject matter jurisdic-

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[5] Subject matter jurisdiction is set forth solely for the purposes of the instant Statement of the Case. Raymond and Bernhoft frequently objected to the district court's lack of subject matter jurisdiction, because the civil action below was not properly authorized according to the strict requirements of 26 U.S.C. § 7408(a).

tion on the district courts to entertain civil actions to enjoin any person from further engaging in conduct subject to penalty under 26 U.S.C. §§ 6700 and 6701. A Section 7408 action may be commenced in a district court of the United States, but only at the request of the Secretary of the Treasury or his delegate.

The Government moved for summary judgment on January 19, 1999. (R. at 251, Pl.'s Mot. for Summ. J.) Raymond and Bernhoft opposed the motion with declarations swearing they had not sold the information binders for over a year prior to the commencement of the injunction action – at a time when they had no knowledge of the IRS civil and criminal investigations proceeding against them – and would not sell the information in the future. (R. at 322, Bernhoft's Third Decl., App. 60, ¶¶ 4-9; R. at 326, Raymond's Fourth Decl., App. 67, ¶¶ 4-9.) Raymond and Bernhoft further declared that they had reputations in their respective communities for truthfulness. (R. at 322, Bernhoft's Third Decl., App. 60, ¶¶ 10-13; R. at 326, Raymond Fourth Decl., App. 67, ¶¶ 10-13.)

On June 17, 1999, Magistrate Callahan recommended summary judgment in favor of the Government, and that the proposed injunction should issue upon the district court's approval. (Appendix D at 29-91.) District Court Judge Charles N. Clevert, Jr. adopted the Magistrate's recommendation in its entirety on July 27, 1999, (Appendix B at 24-25), and subsequently denied Raymond's and Bernhoft's timely Rule 59 motion to alter or amend judgment on September 20, 1999. (Appendix E at 92-98.) Petitioners Raymond and Bernhoft filed a timely joint notice of appeal to the United States Court of Appeals for the Seventh Circuit on November 19, 1999. (R. at 368, Dfs.' Joint Notice of Appeal.) On September 26, 2000, the Court of Appeals affirmed the district court judgment. (Appendix A at 1-23.) Petitioners' request for rehearing *en banc* was denied on December 6, 2000. (Appendix F at 99-100.)

ARGUMENT FOR GRANTING WRIT

The Seventh Circuit Panel's determination that the suit authorization requirements of 26 U.S.C. § 7408 are procedural, rather than jurisdictional, directly conflicts with both its own controlling precedent and the authoritative decisions of every federal court that has considered the question. This naked holding below, wholly bereft of legal analysis and lacking any discussion of universally held contrary authority, makes a presumptuous mockery of unambiguous congressional intent – clearly expressed in the authorizing statute itself – that the Government must comply with certain jurisdictional procedures before federal court door's are open to it for injunction suits. If allowed to stand, a dangerous jurisdictional precedent that is contrary to established law and public policy threatens to infect other circuits that have not considered this question.

Moving cavalierly past this singularly important jurisdictional issue, the Panel approved a permanent injunction on summary judgment – again in spite of its own controlling precedent, the well-reasoned opinions of sister courts of appeal, and this Court's controlling decisions – all of which demanded on opposite result. For not only did the Petitioners cease the complained of activity well before the injunction suit was brought, raising an Article III mootness problem, they opposed summary judgment with unrebutted declarations swearing that they had reputations in their respective communities for truthfulness, and would not engage in the offending conduct in the future. These declarations raised credibility questions this Court has ruled are never properly resolved on summary judgment. Moreover, Raymond's and Bernhoft's sworn averments interposed material disputed facts that precluded summary judgment – the precise position taken by an authoritative decision of the Ninth Circuit on indistinguishable facts.

The Panel could not cite one case in support of its bizarre review methodology on these questions of credibility and material facts bearing on future intent: there simply was no federal authority contrary to Petitioners' uncontroversial position. Perhaps that is why, as with the jurisdictional issue, the Panel refused to discuss, much less mention, the amply briefed and vigorously argued decisions of this Court and other conforming appellate jurisdictions that universally direct the conclusion that summary judgment was inappropriate on facts such as these. Making matters worse, the Panel reviewed the summary judgment grant below under some sort of abuse of discretion balancing standard, as if the permanent injunction had been imposed on the Petitioners after a full trial, instead of on summary judgment. The Panel's unjustifiable legal treatment of these issues directly conflicts with this Court's summary judgment precedents, and has created a variety of inter-circuit conflicts that damage the very fabric of federal jurisprudence in this important area.

The Panel concluded its opinion by sanctioning an abusive permanent injunction over serious political speech concerns raised throughout the proceedings in the district court. It seems the Panel doubted this Court's commitment to its post-*Brandenburg* First Amendment jurisprudence and the protection extended to principled political dissenters who voice opposition to Government agencies they disagree with. And continuing a pattern of ignoring persuasive appellate authority contrary to what clearly was an outcome-driven decision, the Panel refused to discuss the persuasive reasoning of a Ninth Circuit case that correctly interpreted this Court's controlling First Amendment precedents and reversed the criminal convictions of several promoters of abusive trust schemes.

The Seventh Circuit Panel decision below cannot be allowed to stand in defiance of this Court's precedents and the persuasive holdings of numerous other federal courts of appeal. Significantly, such an unreviewed opinion

promises to vexatiously multiply litigation throughout the federal courts of appeal over what were once well-settled legal principles, and sets the law of the Seventh Circuit squarely against this Court's well-reasoned precedents and the conforming federal jurisprudence and common sense practiced and observed by all other federal courts of appeal.

I. Jurisdiction Argument

Internal Revenue Code Suit Authorization Requirements are Unquestionably Jurisdictional, and so Held by Every Federal Court that has Addressed the Matter, Except the Seventh Circuit Panel Below.

Contrary to the Panel's startling decision, Internal Revenue Code suit authorization requirements are jurisdictional. *See United States v. One 1941 Cadillac Sedan*, 145 F.2d 296 (7th Cir. 1944). The entire body of federal authority on this subject derives from this definitive case. An authorization attempt that fails under the controlling Internal Revenue Code statute deprives a federal district court of subject matter jurisdiction: "[W]here the Congress prohibits the commencement of a civil action unless certain specific acts are performed, the court has no jurisdiction over the subject matter until requisite conditions are met in fact and such compliance is shown by the pleadings and, where necessary, established by proof." *United States v. One 1972 Cadillac*, 355 F. Supp. 513, 514 (E.D. Kent. 1973) (citing *United States v. One 1941 Cadillac Sedan*, 145 F.2d 296 (7th Cir. 1944)).

This obvious jurisdictional conclusion is supported by the authoritative decisions of the Sixth, Eighth, and Ninth Circuits, and every other federal court that has addressed the issue. *See United States v. Twenty-Eight "Mighty Payloader" Coin Operated Gaming Devices*, 623 F.2d 510, 513 & n.2 (8th Cir. 1980) (citing *One 1941 Cadillac Sedan*, 145 F.2d at 299; *United States v. Twenty-Two Firearms*,

463 F. Supp. 730 (D.Co. 1979)); *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981) (citing *One 1972 Cadillac Sedan*, 355 F. Supp. at 513); *Palmer v. United States*, 116 F.3d 1309, 1311 (9th Cir. 1997).

Notwithstanding the uncontroverted line of federal authority derived from the Seventh Circuit's own controlling precedent, *see 1941 Cadillac Sedan, supra*, the Panel asserted, without any citation to authority or alternative legal reasoning, that:

> [T]he provision that the suit must be authorized by the Secretary of the Treasury or his delegate, [is] procedural and not jurisdictional. Therefore, even if we were to conclude that the United States had not received proper authorization from the Secretary of the Treasury, that fact would not affect the jurisdiction of the district court.

United States v. Raymond, et al., 228 F.3d 804, 809 (7th Cir. 2000).

The Panel made this naked assertion in spite of the fact that the previously uncontroverted line of cases referred to above were all amply briefed on appeal and fully discussed at oral argument on June 2, 2000. But the Panel refused to mention, much less discuss, these cases or its own controlling jurisdictional precedent, and failed to provide any intellectual support for a holding that purports to cavalierly overturn an axiomatic rule of federal subject matter jurisdiction – the necessity of strict compliance with statutory suit authorization requirements. *See One 1941 Cadillac Sedan*, 145 F.2d at 296.

The Panel was apparently concerned that its insupportable primary jurisdictional holding would not survive this Court's penetrating scrutiny. Apparently based on this well taken concern, the Panel attempted to bolster its decision with a series of "alternative" jurisdic-

tional holdings, unnecessarily offered in light of this Court's sound and time-honored policy of determining cases at the their most foundational level and eschewing discussion of all other matters if that first-level analysis disposes of the case – particularly in the area of subject matter jurisdiction. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908).

The Panel's exposition of unnecessary alternative jurisdictional underpinnings is telling. But although each of these "alternative" holdings fails under controlling authority, the Panel's attempt does fortuitously provide this Court a unique opportunity to state the burden shifting rules of challenges to suit authorization requirements in a coherent way not yet fully explicated by the federal courts of appeal. The appropriate rule derived from authoritative cases dealing with suit authorization challenges also provides the necessary basis for disposing of the Panel's suspect "alternative" holdings.

Once proper suit authorization is challenged, the Government carries the burden of proof and risk of non-persuasion on all elements of proper authorization, and if that burden is not met, the district court is deprived of subject matter jurisdiction:

> [T]he law is clear, and I so hold, that where allegations of authority to proceed and direction to commence the action are denied, the issues are put to proof and the conditions precedent shall not be presumed. There is too much danger that, in the absence of proof of compliance with the conditions precedent, I would be proceeding without jurisdiction.

Twenty-Two Firearms, 463 F. Supp. at 731 (citing *1941 Cadillac Sedan*, 145 F.2d at 296; *1972 Cadillac Sedan*, 355 F. Supp. at 514); *accord Twenty-Eight "Mighty Payloader" Gaming Devices*, 623 F.2d at 513 & n.2.

But in order to put the Government to its jurisdictional proof, proper authorization must either be denied in an answer or challenged in a motion to dismiss at the trial court level. *See 1941 Cadillac Sedan*, 145 F.2d at 296. Although objections to subject matter jurisdiction can never be waived, *see Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 896-97 (1991), a defendant who fails to make a timely district court authorization challenge and first raises this jurisdictional defense on appeal must produce contrary evidence to overcome the rebuttable presumption that the acts of the Attorney General or his delegate are regular if not first challenged in the district court: "[T]he United States attorney is a part of the Department of Justice. He must be presumed, in the absence of evidence to the contrary, to have acted within his authority." *1941 Cadillac Sedan*, 145 F.2d at 299.

With this controlling authority as its guide, it is no wonder the Panel went on to postulate a series of "alternative" jurisdictional suggestions because of an apparent lack of confidence in its primary jurisdictional holding. First, the Panel opined that a letter to the Assistant Attorney General for the Tax Division of the Department of Justice sent by Edward G. Langer ("Langer"), IRS Assistant District Counsel, constituted the effective authorization mandated by 26 U.S.C. § 7408, *see United States v. Raymond*, 228 F.3d at 809, the statute which created the Government's cause of action:

> A civil action in the name of the United States to enjoin any person from further engaging in conduct subject to penalty under section 6700 (relating to penalty for promoting abusive tax shelters, etc.) or section 6701 relating to penalties for aiding and abetting understatement of tax liability) may be commenced at the request of the Secretary.

26 U.S.C. § 7408(a), Appendix J at 107.

Raymond and Bernhoft do not dispute the fact that Langer sent a letter to the Attorney General; rather, the question as it relates to subject matter jurisdiction is whether Langer was a proper delegate of the Secretary of the Treasury for the purpose of making Section 7408 authorization requests.[6] The Panel answered this question by looking to Langer's declaration submitted in opposition to one of Petitioners' motions to dismiss: "Langer submitted a declaration to the district court asserting that he was duly authorized by the Secretary of the Treasury to request that this action be commenced." *United States v. Raymond*, 228 F.3d at 809.

But Langer's declaration made no such assertion. Instead, Langer merely asserts that he was a "delegate of the Chief Counsel, a delegate of the Secretary of the Treasury of the United States of America." (R. At 20, Langer Decl., Sep.A. at 19, ¶ 4.) But a delegate for what purposes? Nowhere in his vague declaration does Langer assert that he is "duly authorized by the Secretary of the Treasury . . . by one or more redelegations of authority" to

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[6] Importantly for this discussion, the term "Secretary" means the Secretary of the Treasury or his delegate. *See* 26 U.S.C. § 7701(a)(11)(B). The phrase "or his delegate" means, when used with reference to the Secretary of the Treasury, "any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context." 26 U.S.C. § 7701(a)(12)(A)(i). Thus the question posed above can be rephrased more precisely: Was Langer "duly authorized by the Secretary directly, or indirectly by one or more redelegations of authority," to "perform the function" of making a Section 7408 request? 26 U.S.C. §§ 7701(a)(12)(A)(i) and 7408(a).

make Section 7408 authorization requests. 26 U.S.C. § 7701(a)(12)(A)(i).[7]

Furthermore, even if Langer had made the required "duly authorized to make Section 7408 authorization requests" averment, he must also point to the delegation orders that specifically delegated Section 7408 request authority to the IRS Assistant District Counsel level:

> If he [a public official] has the authority of law to sustain him in what he has done . . . he must show it to the court and abide the result . . . . It is no answer . . . to say I am an officer of the government and acted under its authority unless he shows the sufficiency of that authority.

Cunningham v. Macon & B.R. Co., 109 U.S. 456 (1883); *see also 1972 Cadillac Sedan*, 355 F. Supp. at 515 ("[T]he mere allegation of facts necessary for jurisdiction without supporting proof is fatally defective.") (relying on *1941 Cadillac Sedan*, 145 F.2d 296).

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[7] At one point the Panel suggested that 26 U.S.C. § 7402(a) might provide the district court below with specific subject matter jurisdiction. *See United States v. Raymond*, 228 F.3d at 809. To the contrary, the action below was brought under 26 U.S.C. § 7408. In turn, Section 7408 requires that an alleged promoter of abusive tax shelters first be found to have engaged in conduct subject to penalty under either Sections 6700 or 6701 before the separate injunction criteria of Section 7408 can be evaluated and potentially applied.

The extensive analysis of both the Magistrate Judge and the Court of Appeals in manipulating these interrelated statutes to justify the injunction demonstrates beyond a shadow of a doubt that Section 7408 is the jurisdiction-conferring statute in this case. If not, Congress didn't really mean it when it said that the Secretary of the Treasury or his delegate must make an authorization request of the Attorney General prior to commencement of a Section 7408 action. This suggestion cannot be taken seriously.

And there is no question that Langer could not properly make a Section 7408 authorization request unless the Secretary of the Treasury had delegated such authority, directly or indirectly, down to the IRS Assistant District Counsel level, because such delegation orders are routinely examined by federal courts faced with challenges to the act(s) of an IRS employee. For example, even the acts of an IRS District Director are void absent expressly delegated authority to do a particular act:

> [T]he authority to settle disputes involving unpaid liability over $100,000 is granted only to IRS Regional Commissioners and Regional Counsel. **Delegation Order 11 (Rev. 13), 1982-1 Cum. Bull. 333**. Thus, even if the District Director had signed the letter and intended to accept Frank's offer of compromise, the acceptance would have been ineffective.

Brooks v. United States, 833 F.2d 1136, 1146 (4th Cir. 1987) (emphasis added); *see also Boulez v. C.I.R.*, 810 F.2d 209, 217-18 (D.C. Cir. 1987).

Moreover, these rules of delegation have universal application outside of Internal Revenue matters. In fact, all powers conferred by Congress on government officials who act in matters affecting private citizens must be made expressly redelegable by statue or regulation to subordinates, and failure to actually make such authorized redelegation voids any subsequent acts. *See Lopez-Telles v. I.N.S.*, 405 F.2d 147, 149-50 (1st Cir. 1969). Specific acts require specific delegation. *See id.* Delegated authority is essential for every act taken on behalf of the government, and only the officer who has been specifically delegated the requisite authority can do the act contemplated. *See United States v. Giordano*, 416 U.S. 505 (1974). In *Giordano*, the defendant challenged the validity of a wiretap application made by a subordinate to the Attorney General, when under existing law it could only be approved by the Attorney General and a specially

designated assistant. *See id.* This Court held the subordinate's act void, declared the wiretap illegal, and ordered the evidence suppressed.

On this authoritative basis, the Panel's analysis of Langer's declaration is clearly erroneous and fatally flawed, for it appears that Langer's declaration was artfully crafted to avoid making a direct statement that he was duly authorized to make Section 7408 authorizations, and this telling omission is jurisdictionally fatal: "[T]he mere allegation of facts necessary for jurisdiction without supporting proof is fatally defective." *1972 Cadillac Sedan*, 355 F. Supp. at 515 (relying on *1941 Cadillac Sedan*, 145 F.2d 296).

Assuming, *arguendo*, that Langer's declaration explicitly stated he was duly authorized to make Section 7408 authorizations, and referred to delegation orders and/or other legal authority that conveyed this authority to him, the burden would have shifted to Raymond and Bernhoft to rebut the declaration's averments. Without discussing the applicable burden shifting rules, however, the Panel asserts, in an astonishing misapprehension of the record, that: "The appellants had ample opportunity to produce evidence that contradicts this [Langer's] declaration and have not done so." *United States v. Raymond*, 228 F.3d at 809.

Indisputably to the contrary, Raymond and Bernhoft introduced unrebutted evidence into the record that the IRS Chief Counsel never redelegated Section 7408 authorization authority to any of his inter-office subordinates – much less all the way down to Langer's assistant district counsel level. (R. at 353, Appeal from Magistrate's Order, pp. 5-6, S. App. 1; R. at 355, Raymond's Eighth Decl., ¶ 4 and Exhibit A attached thereto at p. 5, ¶ 5, S. App. 16, 18, 22; R. at 354, Bernhoft's Fifth Decl., ¶ 4, S. App. 14.) Here we have the explanation as to why the Government steadfastly refused to shoulder its burden of

proving up the jurisdictionally necessary fact of proper Section 7408 authorization.

The evidence Raymond and Bernhoft introduced consisted of an IRS National Office response to a Freedom of Information Act ("FOIA") request Raymond and Bernhoft filed in hopes of countering the district court's refusal to order the Government to produce Langer's delegation orders pursuant to a motion to compel discovery. (R. at 297, Defs.' Mot. To Compel Discovery.) The IRS National Office provided General Counsel Order No. 4 ("GCO #4") to Petitioners, which delegated civil action recommendation authority from the General Counsel, Department of the Treasury, to the Chief Counsel, Internal Revenue Service. (R. at 355, Raymond's Eighth Decl., Ex. A, p. 5, ¶ 5, S. App. 22.) No other delegation orders were provided in response to this request. Significantly in this last regard, the IRS Program Analyst who provided GCO #4 to Raymond and Bernhoft personally confirmed that the IRS Chief Counsel made no further redelegations of Section 7408 civil action recommendation authority. (R. at 354, Bernhoft's Fifth Decl., ¶ 4, S.App. 14.)

Not only was this competent and unrebutted evidence that Langer lacked Section 7408 authority entered several times into the district court record and argued in the briefs, (Appellants' Reply Brief, pp. 4-5.), GCO #4 and its jurisdictional implications were also discussed before the Panel at oral argument. In light of all this, the Panel's flat statement that this evidence did not exist, and the attendant assertion that Raymond and Bernhoft did not shoulder what burden they might have had to produce contrary evidence, is truly mystifying. All told, the Panel's unjustifiable legal treatment of this significant jurisdictional question and its misapprehension of clearly set forth relevant facts constitutes a radical departure from the usual course of federal appellate review. The need for this Court's judicial guidance is acute.

II. Summary Judgment

The Panel Applied an Incorrect Review Standard and Impermissibly Resolved Determinative Credibility Questions on Summary Judgment, in Direct Conflict with this Court's Precedents and the Conforming Decisions of Numerous Federal Courts of Appeal.

In order to prevail on its motion for summary judgment, the Government needed to establish that there were no material facts in dispute and that it was entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp., v. Catrett*, 477 U.S. 317, 322 (1986). Neither the district court nor the Court of Appeals Panel, however, employed this axiomatic summary judgment calculus. Instead, in direct conflict with this Court's summary judgment interpretive precedents, both courts below engaged in lengthy and impermissible abuse of discretion balancing analyses to justify imposition of the injunction. *See United States v. Raymond, et al.*, 78 F. Supp.2d 856, 882-884 (E.D. Wis. 1999), Appendix D at 85-89; *United States v. Raymond*, 228 F.3d at 813-815, Appendix A at 16-20. On this ground alone reversal and remand is required.

Furthermore, as previously explained, both Raymond and Bernhoft opposed summary judgment with sworn declarations asserting they had not sold the controversial information binders for about a year prior to the suit's commencement – at a time when they had no knowledge of the IRS' criminal and civil investigation against them – and that they would not sell them in the future. (R. at 322, Bernhoft's Third Decl., App. at 60, ¶¶ 4-14; R. at 326, Raymond's Fourth Decl., App. at 67, ¶¶ 4-14.) Yet in spite of these declarations, the Panel impermissibly weighed and balanced the evidence before them: "[W]e conclude that their [Raymond's and Bernhoft's] claims that they will not engage in unlawful activity in the future are

insufficient to overcome the other circumstances that indicate that there is a significant likelihood that the appellants will again incite others to violate the tax laws." (Appendix A at 19.)

According to this Court, however, such evidence weighing is not permitted on summary judgment, and furthermore, Raymond's and Bernhoft's sworn declarations raised a material issue of fact regarding Petitioners' credibility and future intent which precluded summary judgment:

> Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on a motion for summary judgment. The evidence of [Petitioners] is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996).[8]

The rule that questions of credibility and intent are inappropriately decided on summary judgment is universally accepted by all federal courts of appeal, but

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[8] By conducting the weighing and balancing analysis, the Panel decision also conflicts with several of its own Seventh Circuit precedents: "In summary judgment procedure the trial court should not weigh the evidence of the plaintiffs against that of the defendants. That is the function of the factfinder at trial." *Staren v. Am. Nat'l Bank and Trust Co.*, 529 F.2d 1257, 1261 (7th Cir. 1976). If the evidence is subject to different interpretations, summary judgment is not appropriate. *See Glass v. Dachel*, 2 F.3d 733, 740 (7th Cir. 1993) (citing *Cornfield v. Consolidated High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir.1993)).

the Fourth Circuit recently stated the rule in the clearest possible terms:

> Summary judgment is seldom appropriate in cases in which particular states of mind are decisive elements of claim or defense, because state of mind is so often proved by inferences from circumstantial evidence and by self-serving direct evidence . . . . Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on [certain] issues . . . he should ordinarily hear the evidence and direct the verdict rather that attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh the evidence in advance of its being presented.

Magill v. Gulf & Western Industries, Inc., 736 F.2d 976, 979 (4th Cir. 1984). [9]

Raymond and Bernhoft also repeatedly pointed to a Ninth Circuit case for the proposition that their declarations raised material disputed facts which precluded summary judgment. *See Great Western Land & Dev., Inc. v. S.E.C.*, 355 F.2d 918 (9th Cir. 1966). The facts, issue, and holding of *Great Western* are perfectly analogous to

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9 *See also Poller v. C.B.S.*, 368 U.S. 473 (1962); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989); *County Floors, Inc. v. A Partnership of Gepner & Ford*, 930 f.2d 1056, 1062 (3rd Cir. 1991) ("Credibility determinations . . . are inappropriate to . . . a ruling on summary judgment"); *National Union Fire Ins. Co. Of Pittsburgh v. Turtur*, 892 F.2d 199, 205 (2nd Cir. 1989) ("Questions of intent . . . are usually inappropriate for disposition on summary judgment"); *Manley v. Plasti-Line, Inc.*, 808 F.2d 468,471 (6th Cir. 1987); *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 910 (6th Cir. 1982)

the case at bar. *See ed.* There, the Securities and Exchange Commission (the "SEC") sought to permanently enjoin two pro se defendants from selling allegedly unregistered securities. *See id.* at 918. Upon receiving the SEC's complaint that the sales in questions violated securities law, the defendants promptly stopped the challenged sales – in spite of their strongly asserted contention that their activities constituted no such violation. *See id.* at 919.

The *Great Western* defendants opposed summary judgment with affidavits declaring they would not sell the challenged securities in the future, even though they admitted no culpability for previous sales, but the district court granted summary judgment over defendants' sworn statements of future intent. *See id.* As the Ninth Circuit further explained on appeal:

> On summary judgment motion, one of the principal issues was whether it was likely that appellants would, unless restrained, continue in the future the offending conduct of the past. The District court when faced with affidavits of appellants stating that they would not violate the Act, found: "There is no assurance that the defendants . . . may not at some future date resume their unlawful activities."

Id.

On appeal at the Ninth Circuit, the Government urged the district court view that it "was under no compulsion to accept the self-serving assurances of appellants," but the court of appeals unhesitatingly reversed and remanded on grounds that appellants' affidavits of future intention raised a material fact, "the resolution of which was essential in order to justify the issuance of the injunction." *Id.* (citing *SEC v. First Guardian Sec. Corp.*, 95 F. Supp. 580 (S.D.N.Y. 1950)). According to the Ninth Circuit panel, the district court

impermissibly weighed the defendants' assurances that they would not violate the securities laws in the future against the Government's suspicion that they would. In the end, the district court refused to credit the defendants' sworn assurances. *See id.* On this score, the appeals court admonished that: "While disbelief of appellants may be a sufficient basis for the ultimate resolution of this issue . . . the [district] court acted too precipitately in fixing upon its disbelief at this state of the proceedings and on the basis of affidavits." *Id.*

Importantly, neither Raymond, Bernhoft, nor the Government could locate any federal authority which controverts the *Great Western* holding. In fact, subsequent cases on analogous facts rely on *Great Western's* thoughtful reasoning. *See, e.g., SEC v. Everest Management Corp.*, 466 F. Supp. 167, 172 (S.D. N.Y 1979) ("[W]here issues of fact remain concerning . . . the reasonable likelihood of future violations, injunctive relief will not be granted upon motion for summary judgment.") (citing *Great Western*, 355 F.2d at 918). Strikingly, the Panel made no mention of *Great Western* in its decision, presumably because it did not apply the axiomatic "material facts in dispute" summary judgment analysis.

Other courts of appeal have reached the same conclusion as the *Great Western* court on very similar facts. Raymond's and Bernhoft's exhaustive declarations that they would not engage in conduct subject to penalty in the future or otherwise incite others not to pay lawfully imposed federal taxes presented a credibility question, and "[t]he courts have long recognized that summary judgment is singularly inappropriate where credibility is at issue. Only after an evidentiary hearing or a full trial can these credibility issues be appropriately resolved." *SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978) (reversing district court grant of summary judgment and remanding for trial) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962) (other citations omitted). The *Koracorp* court went on to note that "[t]he

general rule proscribing summary judgment where credibility is in question is particularly pertinent here," because the *Koracorp* defendants asserted, as Raymond and Bernhoft have here, that they would never commit the complained of violations again. *Id.*

In this case, as in *Great Western and Koracorp*, whether an injunction is necessary and appropriate to prevent the recurrence of the conduct is a disputed fact "the resolution of which is essential in order to justify the issuance of the injunction." *Id.*; 26 U.S.C. § 7408(b)(2). Furthermore, this disputed fact is material because the evidence, when viewed in a light most favorable to Raymond and Bernhoft, would permit a reasonable factfinder to decide that an injunction was not necessary to prevent the recurrence of the conduct. *See Eiland v. Trinity Hospital*, 150 F.3d 747, 750, (7th Cir. 1998) (citing *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1290 (7th Cir. 1997)). In turn, the relevant factors in determining whether an injunction is necessary to prevent the recurrence of the conduct are:

> [T]he gravity of the harm caused by the offense; the extent of the defendant's participation and his degree of scienter; the isolated or recurrent nature of his infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions; the defendant's recognition of his own culpability; and the sincerity of his assurances against future violations.

United States v. Kaun, 827 F.2d 1144, 1149 (7th Cir. 1987) (quoting *S.E.C. v. Holschuh*, 694 F.2d 130, 144 (7th Cir. 1982)).

Raymond's and Bernhoft's sworn declarations not only stated they had stopped selling the information binders well before they became aware of the IRS investigation, and would not sell them in the future, but

also asserted that they had: (1) reputations in their communities for being truthful; (2) never relied on the binder sales for their living; and (3) other primary occupations that did not predispose them to future involvement with such activity. (R. at 322, Bernhoft's Third Decl., ¶¶ 7-14, App. 60; R. at 326, Raymond's Fourth Decl., ¶¶ 7-14, App. 67.)

Significantly, the Government never rebutted Raymond's and Bernhoft's declarations, and under the Seventh Circuit's own authority, Raymond's and Bernhoft's unrebutted declarations of future intent must be taken as true. *See Wang v. Lake Maxinhall Estates, Inc.*, 531 F.2d 832, 835 & n.10 (7th Cir. 1976). And construing Raymond's and Bernhoft's explicit declarations in the most favorable light to them and drawing all inferences therefrom in their favor, it is self-evident that a reasonable factfinder could have determined that the injunction was not necessary, because Raymond and Bernhoft would not engage in the offending conduct in the future. The Panel decision has made a horrible muddle of what were well-settled summary judgment principles in the Seventh Circuit, and cannot stand.

III. First Amendment

Raymond's and Bernhoft's Sale of Information Binders was at Most Mere Political Advocacy, Not Incitement to Imminent Lawless Action, and was Therefore First Amendment Protected Speech.

The Panel seems to have adopted the overruled First Amendment approach set out in *Whitney v. California*, 274 U.S. 357 (1927). In overturning that unsound decision and its intellectual antecedents, this Court observed that the *Whitney* majority had simply permitted the sanction of "ideas which the . . . Court deemed unsound and dangerous." *See Brandenburg v. Ohio*, 395 U.S. 444, 452 (1969) (Douglas, J. concurring). As the

Court further held: "[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *See id.* In turn, speech directed to incite "imminent lawless action" is speech that can result in nothing other than violations of law.

But as the Panel decision concedes, only about half of the information purchasers took any action whatever after purchasing the information – lawful or otherwise. *USA v. Raymond*, 228 F.3d 807, Appendix A at 3. The other half did nothing except perhaps read the information – which Raymond and Bernhoft do no understand to be illegal. Moreover, the Panel incorrectly asserts that: "The Government presented the declarations of several Program customers who admitted failing to file income tax returns, filing request for refunds to which they were not entitled, and submitting numerous FOIA requests." *USA v. Raymond*, 228 F.3d at 813, Appendix A at 17. To the contrary, no such declarations were ever presented by the Government.[10] But even on these disputed facts, Raymond's and Bernhoft's speech did not produce much allegedly lawless action: how "imminent" and "likely" can that be under the *Brandenburg* rule? Examining the instant case in *Brandenburg's* light, Raymond's and

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10 The Panel also incorrectly asserts that: "Upon contacting Morningstar, callers were encouraged to purchase the De-Taxing America Program." *USA v. Raymond*, 228 F.3d 812, Appendix A at 13-14. This material misapprehension of the record appears out of whole cloth, because there is not one scintilla of evidence in the record to support it. In fact, the record shows that Raymond and Bernhoft never encouraged anyone to purchase the controversial information. (R. at 268, Dable Depo., 11:7-16.)

Bernhoft's sale of information binders was clearly protected speech.[11]

Not surprisingly, the Panel decision relied heavily on *United States v. Kaun*, 827 F.2d 1144 (7th Cir. 1987) for its First Amendment holding. Unlike Dennis Kaun, though, Raymond and Bernhoft did not tell people not to file the IRS Form 1040 or pay taxes, nor did they advocate bogging down the IRS with numerous FOIA requests, or advocate "serving federal judges with 45's." *See Kaun*, 827 F.2d at 1149; R. at 322, Bernhoft's Third Decl., ¶¶ 16-22, App. at 60; R. at 326, Raymond's Fourth Decl., ¶¶ 16-23, App. at 67. Even in *Kaun*, however, the Seventh Circuit seemed deeply troubled by the First Amendment implications of the injunction contemplated there, as evidenced by Judge Ripple's thoughtful concurrence: "I believe it would be a mistake for the government or for the district courts in this circuit to interpret this case as signaling any diminution in our scrutiny of government submissions aimed at curtailing first amendment rights." *Kaun*, 826 F.2d at 1154-55 (Ripple, J., concurring). It is therefore surprising that the Panel chose to largely overlook the injunction's serious First Amendment problems

Moreover, the Panel decision directly conflicts with *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983). There, defendants were charged criminally under 26 U.S.C. § 7206 for promoting a tax avoidance trust scheme, and were convicted in the district court below. *See id.* The appeals court, however, overturned their convictions on First Amendment grounds: "Nothing in the record indicates that the advocacy practiced by these defendants contemplated imminent lawless action. Not even national

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11 Worth noting in this regard is the fact that Assistant U.S. Attorney Francis Schmitz refused to prosecute Raymond and Bernhoft criminally based on his belief that Raymond's and Bernhoft's sale of information binders was First Amendment protected speech. (R. at 306, Dfs.' Br. in Opp. to Mot. for Protective Ord., Ex. A, App. 44.)

security can justify criminalizing speech unless it fits within this narrow category; certainly concern with protecting the public fisc, however laudable, can justify no more." *Id.* at 1428.

The Government argued below that several purchasers of the Raymond's and Bernhoft's information binders did, in fact, commit lawless actions. (R. at 251, Pl.'s Mot. for Summ. J.) But the *Brandenburg* test does not rise and fall on the actions of listeners, but on the actual conduct of the speaker:

> Even if the defendants knew that a taxpayer who actually performed the actions they advocated would be acting illegally, the first amendment would require a further inquiry before a criminal penalty could be enforced. With the exception of Durst, no defendant actually assisted in the preparation of any individual tax return. Rather, they merely instructed an audience on how to set up a particular tax shelter.

Id. at 1428 (citing *Brandenburg*, 395 U.S. at 444).

If the First Amendment protected Dahlstrom and his co-defendants, who actually advocated aggressive participation in a tax avoidance scheme which they knew could result in criminal and civil penalties against investors, how much more so are Bernhoft and Raymond protected from government attempts to silence their political speech? Much more so. Perhaps Justice Douglas's commentary on the abysmal Supreme Court First Amendment jurisprudence prior to *Brandenburg* can be applied to the Panel decision: "[T]he threats [aggressive political speech] were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous." *Brandenburg*, 395 U.S. at 454 (Douglas, J., concurring).

CONCLUSION

Arbitrary Government action is the enemy of ordered liberty, because the Government inevitably teaches the people by its own example. Lack of confidence in the regularity of Government action breeds contempt for the law. There is no public policy more important, therefore, than requiring Government officials to evidence the authority by which they act against citizens. Judicial insistence that Government actors possess proper delegated authority to perform official acts serves these paramount purposes – as does enforcing strict compliance with statutory authorization requirements when the Government sues its own citizens.

Ensuring uniformity of decision amongst the federal courts of appeal also serves these important goals, for an American citizen rightfully expects that the law will be equally and fairly applied – no matter how unpopular his beliefs or speech. In fact, we tolerate the speech we hate because one day our speech might be hated. Surely protecting a citizen's right to criticize his Government, and to exchange information toward that purpose with like-minded individuals, holds a higher place in our jurisprudence and philosophy than protecting books that teach how to build bombs or depict some novel form of sexual debauchery. The Petition for Writ of Certiorari should be granted forthwith in furtherance of these goals.

Respectfully submitted on this the 6th day of March, A.D. 2001.

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